

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3
4 August Term, 2005

5 (Argued: May 30, 2006

Decided: August 16, 2006)

6 Docket No. 06-1973-ag Con [06-1477-ag Lead]

7
8 DEU THAPA,

9 *Petitioner,*

10 —v.—

11 ALBERTO GONZALES, Attorney General of the United States,

12 *Respondent.*

13
14 B e f o r e :

15 SACK, KATZMANN, *Circuit Judges,*
16 and MURTHA, *District Judge.**

17
18 Petitioner moved for a stay of the 60-day voluntary departure order issued by the Board of
19 Immigration Appeals pending our consideration of his petition for review. We granted that
20 motion in a previous order and now write to explain our decision. We conclude that we have the
21 authority under 28 U.S.C. § 2349(b), as incorporated by reference in 8 U.S.C. § 1252(a)(1), to
22 grant stays of voluntary departure orders and that the appropriate standard for granting such stays
23 is the same as the standard for granting stays of removal orders. Because petitioner satisfies this
24 standard, a stay of his voluntary departure order is warranted.

25

* The Hon. J. Garvan Murtha, United States District Judge for the District of Vermont,
sitting by designation.

1 APPEARING FOR PETITIONER: JUSTIN T. CONLON (Michael J. Boyle, *of counsel*),
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3 APPEARING FOR RESPONDENT: DAVID S. RUBENSTEIN, Assistant United States
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5 States Attorney, *of counsel*) for Michael J. Garcia,
6 United States Attorney for the Southern District of
7 New York.
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10 KATZMANN, *Circuit Judge*:

11 This motion presents an issue of first impression in this Circuit: whether we have
12 jurisdiction under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, to stay an order
13 of voluntary departure issued by an immigration judge or the Board of Immigration Appeals.
14 Having concluded that we do, and that the petitioner here, Deu Thapa, had met the traditional
15 standards for a stay, we previously granted the motion for a stay in a short order stating that an
16 opinion would follow. We now explain the reasoning behind that decision.

17 We hold that we have the authority under 28 U.S.C. § 2349(b), as incorporated by
18 reference in 8 U.S.C. § 1252(a)(1), to stay an agency order pending our consideration of a
19 petition for review on the merits, and that nothing in the Immigration and Nationality Act or its
20 implementing regulations strips us of this authority with respect to orders of voluntary departure.
21 We also hold that a BIA order granting voluntary departure with an alternate order of removal is
22 a final order of removal subject to judicial review under 8 U.S.C. § 1252. Because, under the
23 customary framework for a stay, the balance of hardships tips decidedly in Thapa's favor, a stay
24 of his voluntary departure order is warranted here.

1 I.

2 The complete administrative record has not been filed with the Court as part of this
3 motion, but the following is clear from the materials submitted by the parties. Deu Thapa, a
4 native and citizen of Nepal, was apprehended by the United States Customs and Border
5 Protection at White River Junction, Vermont, in early 2004. At that time, as the Immigration and
6 Naturalization Service (“INS”) subsequently alleged in a Notice to Appear (“NTA”), Thapa was
7 unable to provide a document demonstrating his legitimate entry into the United States, nor was
8 he able to establish the date, place, or manner of his entry into the United States.¹ Accordingly,
9 the INS charged that Thapa was subject to removal because of his improper entry into the United
10 States. In a subsequent NTA, the INS amended that charge to constitute overstaying a
11 nonimmigrant visa.

12 During a hearing before Immigration Judge Michael W. Straus (the “IJ”), Thapa, through
13 counsel, denied the allegation that his entry into the United States was improper but admitted the
14 allegation that he overstayed his visa. However, Thapa sought relief from removal by
15 challenging the validity of the NTA, arguing that it was improperly issued because it was
16 unsigned. He also argued that the issuance of the NTA was an abuse of discretion — why is not

¹ Prior to the Homeland Security Act of 2002, Pub. L. 107-296 § 441, 116 Stat. 2135, 2193 (2002), 6 U.S.C. § 202(3), § 251, the INS, an independent agency within the Department of Justice, enforced the immigration laws. That Act dissolved the INS and transferred responsibility for enforcing immigration laws to the newly created Bureau of Immigration and Customs Enforcement (“ICE”) within the new Department of Homeland Security. *See United States v. Shitian Wu*, 419 F.3d 142, 146 n.3 (2d Cir. 2005). Even though the relevant documents in this case were submitted after the transfer from INS to ICE was effected, the NTA continued to refer to the charging agency as the INS. To avoid confusion, we follow suit.

1 clear — and that he was questioned at the border by an agent unauthorized by regulation to
2 question him. In addition, Thapa moved for a continuance of the hearing so that the Connecticut
3 Department of Labor would have time to adjudicate his request for labor certification, which, if
4 approved, would allow him to remain in the United States and work legally. Finally, in the
5 alternative, Thapa moved for voluntary departure, which would allow him to leave the United
6 States willingly instead of being forcibly removed by the United States government.

7 The IJ rejected Thapa's argument that the NTA was improperly issued. The IJ noted that
8 there were actually three NTAs in the record: the first one, which was unsigned; a second one,
9 signed by Senior Patrol Agent Trahan on behalf of John C. Pfeiffer, Patrol Agent in Charge in
10 Newport, Vermont; and a third one signed by Pfeiffer himself. The IJ concluded that "the critical
11 NTA, i.e. the one that was filed with the Immigration Court, was signed by Mr. Pfeiffer" and was
12 therefore proper. The IJ dismissed Thapa's argument that proper service of the NTA would have
13 been effected only if Thapa had been personally served with the NTA signed by Pfeiffer, noting
14 that the Immigration and Nationality Act ("INA") requires personal service of the NTA only if it
15 is practical, and observing that the language of the unsigned NTA served on Thapa and the one
16 signed by Pfeiffer was identical. The IJ also rejected Thapa's other concerns about the issuance
17 of the NTA and his questioning at the border.

18 Further, the IJ declined to continue the hearing pending the determination of Thapa's
19 labor certification. The IJ explained that the labor certification had been filed eight months
20 before, that it would be speculative to conclude that the certification would be granted, and that

1 there was not a sufficient basis in the record to continue the hearing.²

2 The IJ did, however, grant Thapa’s alternative request for voluntary departure, ordering
3 Thapa’s departure within 60 days and payment of a \$1,000 voluntary departure bond. The order
4 provided that, if Thapa did not comply with these requirements, the voluntary departure order
5 would convert, without further notice, to a final order of removal to Nepal.

6 Thapa appealed to the Board of Immigration Appeals (“BIA”). By order dated February
7 28, 2006, the BIA affirmed in an unpublished per curiam decision signed by one member of the
8 Board. The BIA agreed with the IJ that Thapa had not established that he was improperly placed
9 in removal proceedings, and in any event that Thapa had not established the requisite prejudice
10 that is necessary to prevail on a due process claim.

11 As to Thapa’s argument that the IJ should have agreed to a continuance of his hearing
12 pending determination of the labor certification, the BIA concluded that “an open-ended
13 continuance to await adjudication of a pending labor certification is not appropriate when there is
14 no indication of how long it will take to conclude adjudication of the petition, and the basis for
15 the continuance is speculative because there is no certainty that the petition will receive favorable
16 consideration.” The BIA specifically declined to extend its decision in *Matter of Velarde*, 23 I.
17 & N. Dec. 253 (BIA 2002) — which, it explained, “indicates that a continuance may be
18 appropriate in the case of an unadjudicated family based petition” — to apply to employment-
19 based visa petitions, on the grounds that family reunification is the goal of the INA in a way that

² From the language of the opinion, which refers to a “further continuance,” it seems that the IJ might have granted a prior request for a continuance, but whether this is the case is not clear from the record currently before the Court.

1 immigration for employment purposes is not. Moreover, the BIA explained, such a preference is
2 reasonable because, among other grounds, the family bond is permanent while an employment
3 relationship is temporary. The BIA failed to address the IJ's order of voluntary departure.

4 Thapa filed a petition for review of the BIA's order in this Court. Before any action was
5 taken on that petition, however, the BIA reopened proceedings *sua sponte* after realizing that it
6 had neglected to reinstate the voluntary departure order. In a reissued decision dated April 10,
7 2006, the BIA restated its previous conclusions and additionally ordered Thapa to voluntarily
8 depart within 60 days from the date of the order (or any extension of that time as may be granted
9 by the Department of Homeland Security). Like the IJ's order before it, this order provided that
10 the order of voluntary departure would convert automatically into an order of removal if Thapa
11 did not timely depart.

12 Shortly thereafter, on April 19, 2006, Thapa moved this Court for voluntary dismissal of
13 his petition for review of the first BIA order, which motion was granted. Simultaneously, he
14 filed a new petition for review of the second BIA order and also moved for a stay of the BIA's
15 order of voluntary departure. A month later, on May 18, 2006, Thapa submitted a separate
16 motion for a stay of removal. We heard oral argument on these motions on May 30, 2006, and
17 issued our order granting Thapa's motion for a stay of the BIA's order of voluntary departure on
18 June 7, 2006. A briefing schedule for the petition on the merits has not yet been set.

19 II.

20 A. Overview: Voluntary Departure

21 The existence of voluntary departure enables aliens identified by the government as being

1 illegally present in the United States to leave the country of their own accord without being
2 forcibly removed by the government. The statute provides for two types of voluntary departure,
3 one available in lieu of removal proceedings or before the conclusion of removal proceedings,
4 *see* 8 U.S.C. § 1229c(a), and the second available after removal proceedings have been
5 completed, *see* 8 U.S.C. § 1229c(b).

6 Almost any alien — with the exception of those who have been convicted of an
7 aggravated felony and those who have engaged in terrorist activities or are associated with
8 terrorist organizations — is eligible for the first type of voluntary departure. 8 U.S.C. §
9 1229c(a)(1). Qualifying aliens may receive a grant of voluntary departure from the Attorney
10 General for a period of up to 120 days, although in certain circumstances an alien may obtain a
11 waiver from this time frame for medical treatment. 8 U.S.C. § 1229c(a)(2). The Attorney
12 General may but need not require the alien to post a voluntary departure bond that will be
13 returned after proof that the alien has left the United States within the required time frame. 8
14 U.S.C. § 1229c(a)(3).

15 The second type of voluntary departure is more restrictive. In order for an alien to obtain
16 voluntary departure in lieu of removal at the conclusion of removal proceedings, an IJ must find
17 that (1) the alien was physically present in the United States for at least a year before the Notice
18 to Appear was served; (2) the alien is and has been a person of good moral character for the five
19 years leading up to the alien's application for voluntary departure; (3) the alien is not subject to
20 deportation for having been convicted of an aggravated felony or for engagement in terrorist
21 activities or association with terrorist organizations; and (4) the alien has established by clear and

1 convincing evidence that he or she has both the means and the intention to depart the United
2 States within the time specified. 8 U.S.C. § 1229c(b)(1). Grants of voluntary departure under
3 this subsection are valid for up to only sixty days, instead of the 120 days for voluntary departure
4 granted before the completion of removal proceedings. 8 U.S.C. § 1229c(b)(2). Unlike the
5 discretionary standard for voluntary departure bonds under the previous subsection, the alien is
6 always required to post a voluntary departure bond in order to obtain voluntary departure under
7 this subsection. 8 U.S.C. § 1229c(b)(3). Thapa's grant of voluntary departure was of this second
8 type.

9 Voluntary departure under either subsection benefits both the government and the alien
10 who obtains it. The government need not expend resources removing the alien from the United
11 States; moreover, an alien subject to a voluntary departure order is likely to leave the country
12 more quickly than the government would execute an order of removal. *See, e.g., Rife v. Ashcroft*,
13 374 F.3d 606, 614 (8th Cir. 2004). In turn, aliens benefit from voluntary departure because

14 it allows them to choose their own destination points, to put their affairs in order
15 without fear of being taken into custody at any time, to avoid the stigma and
16 various penalties associated with forced removals (including extended detention
17 while the government procures the necessary travel documents and ineligibility
18 for readmission for a period of five or ten years, *see* 8 U.S.C. § 1182(a)(9)(A)),
19 and it facilitates the possibility of return to the United States, for example, by
20 adjustment of status.

21 *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). Thus, both the government and an
22 alien can benefit when an alien leaves the country via a voluntary departure rather than a forcible
23 removal.

24 At the same time, it is important to recognize that, for an alien, serious consequences

1 result from either noncompliance or compliance with a voluntary departure order. On the one
2 hand, failing to depart voluntarily within the specified time period results in a civil penalty of
3 between \$1,000 and \$5,000 as well as ineligibility for a period of ten years for most immigration
4 benefits, including cancellation of removal, adjustment of status, and change of nonimmigrant
5 classification. 8 U.S.C. § 1229c(d). On the other hand, an alien who departs voluntarily is
6 barred from admission to the United States for a period of either three years (for aliens who had
7 been present in the United States for more than 180 days but less than one year) or ten years (for
8 aliens who had been present in the United States for more than one year), regardless of what legal
9 avenues for a change of immigration status might otherwise be available to him or her. 8 U.S.C.
10 § 1182(a)(9)(B). Additionally, while the Illegal Immigration Reform and Immigrant
11 Responsibility Act of 1996 (“IIRIRA”) revised the INA to permit aliens to appeal adverse
12 decisions of the BIA even after leaving the United States, *see Rife*, 374 F.3d at 615, such a long-
13 distance appeal is logistically difficult. Moreover, for those aliens who have sought asylum,
14 withholding of removal, or relief under the Convention Against Torture and who may find it
15 difficult as a practical matter to depart to any other country than the one they wish to flee,
16 departing may present real danger. *See id.* “Thus,” as the Seventh Circuit has explained, “aliens
17 who are granted voluntary departure face a difficult choice: either follow the rules, depart
18 voluntarily, and obtain a few benefits, at the price of serious or fatal difficulty in pursuing relief
19 and exposure to intolerable conditions in the country of destination; or break the rules by failing
20 to leave, accept the penalties associated with that failure, and continue to press any appeals.”
21 *Lopez-Chavez*, 383 F.3d at 651.

1 B. Judicial Authority to Stay Voluntary Departure Orders

2 This motion presents an issue of first impression in this Circuit: whether, notwithstanding
3 the 60-day statutory time frame for voluntary departure, we have the authority to stay the order of
4 voluntary departure pending consideration of a petition for review on the merits. The First,
5 Third, Sixth, Seventh, Eighth, and Ninth Circuits have all concluded that the Courts of Appeals
6 do have such authority. *See Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Obale v. Attorney*
7 *Gen. of the United States*, 453 F.3d 151 (3d Cir. 2006); *Nwakanma v. Ashcroft*, 352 F.3d 325
8 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374
9 F.3d 606 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003). Only the Fourth
10 Circuit has reached the opposite result. *See Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004).
11 We believe that the majority position is the better one, and we adopt it here.

12 We begin with the presumption set forth in 28 U.S.C. § 2349(b), as incorporated by
13 reference in 8 U.S.C. § 1252(a)(1), that, in reviewing orders of federal agencies, “the court of
14 appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order
15 pending the final hearing and determination of the petition.” 28 U.S.C. § 2349(b); *see also Rife*,
16 374 F.3d at 615 (citing Fed. R. App. P. 8 for the proposition that “[t]he grant or denial of a stay
17 pending appeal is a customary part of the judicial function”). While “Congress may restrict our
18 power to grant stays,” *Rife*, 374 F.3d at 615, the restriction must come from some statutory
19 provision.

20 The government argues that “the totality of the legislative scheme” provides that
21 restriction. In particular, the government points to (a) two provisions from the section of the INA

1 governing judicial review, 8 U.S.C. § 1252; (b) one provision from the section of the INA
2 governing the procedures for voluntary removal, 8 U.S.C. § 1229c; (c) one provision of the
3 corresponding regulation, 8 C.F.R. § 1240.26; and (d) the statute governing stays of agency
4 orders, 28 U.S.C. § 2349(b). We disagree with the government’s reading of each of these
5 provisions.

6 As to the section of the statute governing judicial review, 8 U.S.C. § 1252(a)(2)(B)
7 provides that “Notwithstanding any other provision of law . . . no court shall have jurisdiction to
8 review . . . any judgment regarding the granting of relief under section . . . 240B [codified as 8
9 U.S.C. § 1229c, on voluntary departure].” The government asks us to read this provision as
10 stripping us of jurisdiction to issue stays of voluntary departure orders. Yet in granting a stay of
11 an order of voluntary departure, we would not be reviewing any judgment regarding the
12 voluntary departure itself — *i.e.*, whether the alien did or did not meet the statutory qualifications
13 for a voluntary departure. *See* 8 U.S.C. § 1229c(b)(1). Rather, we would be putting a hold on
14 the operation of the order while we reviewed the merits of the underlying petition for review.
15 *See Bocova*, 412 F.3d at 267; *Lopez-Chavez*, 383 F.3d at 652; *Rife*, 374 F.3d at 615; *El Himri*,
16 344 F.3d at 1262. This provision cannot fairly be stretched to prohibit stays of voluntary
17 departure orders.

18 The government also points to 8 U.S.C. § 1252(b)(3)(B), which provides that “[w]ith
19 respect to review of an order of removal . . . [s]ervice of the petition [for review] . . . does not
20 stay the removal of an alien pending the court’s decision on the petition, unless the court orders
21 otherwise.” The government notes that this provision specifically mentions stays of removal

1 orders but does not provide for stays of voluntary departures, and reads the absence of the former
2 as a prohibition. But in our view this reading is also a stretch, as the provision is not framed as
3 an affirmative list of the court’s powers with regard to stays; instead, its narrow focus is on the
4 fact that stays of removal are not automatic but must be specifically granted by a court, a change
5 put in place by the IIRIRA. *See Rife*, 374 F.3d at 615. Moreover, even if this provision were
6 ambiguous regarding the availability of stays of voluntary departure — which we do not believe
7 it to be — “statutory ambiguities ordinarily are to be construed in favor of the alien in the
8 immigration context.” *Bocova*, 412 F.3d at 267 (citing *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)).

9 As to the section of the statute governing the procedures for voluntary removal, the
10 government points to 8 U.S.C. § 1229c(f): “No court shall have jurisdiction over an appeal from
11 denial of a request for an order of voluntary departure [after the conclusion of removal
12 proceedings], nor shall any court order a stay of an alien’s removal pending consideration of any
13 claim with respect to voluntary departure.” Once more, while the government urges us to read
14 this provision broadly, its plain terms do not permit such a reading, as neither the first half nor
15 the second half of the provision describes the instant situation. This is not an appeal from a
16 *denial* of a request for an order of voluntary departure; to the contrary, the request for an order of
17 voluntary departure was *granted*, and the appeal is of the IJ’s rejection of Thapa’s other
18 arguments — which went to his substantive removability, rather than the manner of his departure
19 — at the hearing. Nor are we considering “any claim with respect to voluntary departure” and
20 issuing a stay of *removal* in the meantime; again, Thapa is not challenging the issuance of the
21 voluntary departure order (which, indeed, he sought) but rather the finding of his removability in

1 the first place, and the question is whether we can issue a stay of *voluntary departure*. Indeed,
2 the fact that this provision — which specifically sets forth one type of stay that cannot be issued
3 — does not state that stays of voluntary departure are impermissible actually lends some support
4 to the idea that Congress did not mean to bar them. In this respect, the lack of an exhaustive list
5 here is different from the provision for stays of removal discussed in the previous paragraph,
6 because this list is designed to circumscribe the powers of the court with respect to voluntary
7 departures, whereas the reference to stays of removal discussed above is not framed as a list of
8 the court’s powers.

9 Next, as to the regulatory provision governing voluntary departure, the government points
10 to 8 C.F.R. § 1240.26(f), which in relevant part reads as follows:

11 Extension of time to depart. Authority to extend the time within which to depart
12 voluntarily specified initially by an immigration judge or the Board is only within
13 the jurisdiction of the district director, the Deputy Executive Associate
14 Commissioner for Detention and Removal, or the Director of the Office of
15 Juvenile Affairs. . . . In no event can the total period of time, including any
16 extension, exceed 120 days [for voluntary departure without instituting removal
17 proceedings] or 60 days [for voluntary departure at the conclusion of removal
18 proceedings]

19 According to the government, this section means that only these named individuals within the
20 Executive Office for Immigration Review (“EOIR”) have the authority to allow the alien to
21 remain in the country for any longer than the order of voluntary departure provides, and the total
22 number of days that an alien can stay in the country after the issuance of such an order is no more
23 than 60 days. Again, we think this is a misreading. This provision does not purport to say
24 anything about the jurisdiction of the Courts of Appeals. The title of the regulation is “Voluntary
25 Departure – authority of the Executive Office for Immigration Review,” and as that title

1 indicates, its focus is on what powers the EOIR has, not on what powers the courts possess or
2 lack. *Cf. Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1178 (9th Cir. 2003) (opinion of Berzon,
3 J., concurring) (“[T]he fact that IIRIRA’s language commits the voluntary departure decision to
4 the executive branch does not limit our equitable authority to grant a stay of the voluntary
5 departure period. The statutory language that discusses removal is just as unequivocal about
6 executive primacy in making removal decisions, yet we stay these orders using our equitable
7 authority all the time.”); *see also El Himri*, 344 F.3d at 1262 (“Because this court’s equitable
8 authority is distinct from the District Director’s authority to grant extensions of the voluntary
9 departure time period, this court’s grant or denial of a motion for stay of the voluntary departure
10 time period shall not interfere with the District Director’s authority to grant an extension of the
11 voluntary time period. . . .”).

12 In its final attempt to locate a statutory restriction on our authority to issue stays of
13 voluntary removal orders, the government reads 28 U.S.C. § 2349(b), as incorporated by
14 reference in 8 U.S.C. § 1252(a)(1), to permit a court of appeals to “suspend . . . the operation of
15 the order pending the final hearing and determination of the petition” only where the court has
16 jurisdiction to review the order itself; because we may not review the voluntary departure order
17 itself, the government asserts that we may therefore not stay it. In effect, the government
18 replaces “determination of the petition” with “review of the order.” But this is not what the
19 provision says. Nor does anything in 8 U.S.C. § 1252(b) — which 8 U.S.C. § 1252(a) says may
20 place some exceptions on the scheme of which 28 U.S.C. § 2349(b) is a part — support the
21 government’s interpretation. As explained above, 8 U.S.C. § 1252(b) simply makes no mention

1 of stays of voluntary departure.

2 The government also makes two legal arguments less grounded in particular statutory or
3 regulatory provisions, neither of which we find persuasive. The government explains that the
4 fact that the IIRIRA permits aliens to pursue petitions for review on the merits even after they
5 have departed — in contrast to the previous scheme, under which an alien who had left the
6 country was foreclosed from obtaining judicial relief — means that aliens need no longer choose
7 between departing voluntarily and pursuing judicial relief. *See, e.g., Moore v. Ashcroft*, 251 F.3d
8 919, 922 (11th Cir. 2001) (emphasizing that new regime allows aliens to pursue an appeal from
9 abroad). According to the government, the absence of this painful choice vitiates the need for a
10 stay of voluntary departure. Yet as we have explained, those aliens who have left voluntarily
11 while their petition on the merits is pending continue to face burdens in obtaining all the relief
12 they might have received had they remained in the country with legal authorization during the
13 pendency of their appeal, ranging from the bar on reentry and the difficulties of pursuing an
14 effective appeal while abroad to the potential difficulties faced by those who do not wish to
15 return to their home countries from which they fled and who would have to find some other
16 nation to accept them. Moreover, although the consequences of complying with a voluntary
17 departure order are no doubt less painful after the IIRIRA because of the continued chance to
18 pursue an appeal from abroad, nothing about this fact speaks to our power to issue stays in the
19 first instance.

20 The government also argues that the cap on the number of days within which an alien
21 may voluntarily depart establishes Congress's intent to get aliens who have agreed to depart to

1 leave the country quickly. According to the government, the fact that the cap decreases from 120
2 days for aliens who agree to depart before a hearing to 60 days for aliens who are granted
3 voluntary departure after a hearing demonstrates Congress's intent "to encourage aliens to forego
4 protracted litigation and to circumscribe voluntary departure relief relative to how much time and
5 effort are spent by the Government in having to litigate an alien's challenge to removability."
6 But since an alien who has departed voluntarily may still pursue an appeal on the merits, it is
7 unclear how the government would be saved any time and effort at all if we held that we could
8 not issue stays. Whether the alien is litigating from the United States or elsewhere has no
9 bearing on the work the government must do to oppose an appeal. And while it may be
10 Congress's intent that aliens who have agreed to voluntary departure leave quickly, it is too much
11 to infer that Congress meant to strip courts of their ability to stay orders of voluntary departure.
12 To the contrary, "if it were Congress's intention to divest the courts of appeals of authority to
13 suspend voluntary departure periods, it would have expressed that intention in a much more
14 direct and pointed fashion." *Bocova*, 412 F.3d at 267.

15 Finally, the government attempts to rely on a separate line of cases holding that Courts of
16 Appeals may not reinstate voluntary departure periods that have expired — where, in other
17 words, the alien did not move for temporary relief from the voluntary departure order until after
18 the deadline for such departure had passed. *See Bocova*, 412 F.3d at 266; *Rife*, 374 F.3d at 616;
19 *Ngarurih*, 371 F.3d at 192-93; *Zazueta-Carrillo*, 322 F.3d at 1174; *Reynoso-Lopez v. Ashcroft*,
20 369 F.3d 275, 277 (3d Cir. 2004); *Sviridov v. Ashcroft*, 358 F.3d 722, 731 (10th Cir. 2004);
21 *Mullai v. Ashcroft*, 385 F.3d 635, 639-40 (6th Cir. 2004); *Alimi v. Ashcroft*, 391 F.3d 888, 892

1 (7th Cir. 2004). This argument, too, is unavailing, for it does not distinguish between the
2 authority to keep an agency order from taking effect (which is what we are being asked to do
3 here) and the more questionable authority to rewrite an agency's order after that order has already
4 taken effect (which is what we would be asked to do had Thapa waited to request relief until after
5 his voluntary departure order had automatically converted into an order of removal). That the
6 practical effect of a reinstatement and a stay may be similar — in that the alien is permitted in
7 both instances to remain in the country beyond the date ordered to leave by the BIA — does not
8 mean that the same legal considerations necessarily apply to both. *Cf. Lopez-Chavez*, 383 F.3d
9 at 652 (contrasting the power to extend the deadline for voluntary departure with the power to
10 preserve the status quo pending judicial review). As the question of reinstatement is not
11 presented here, we need not now take a position on that question in order to conclude that the
12 cases on reinstatement in no way foreclose the availability of a stay. *See, e.g., Bocova*, 412 F.3d
13 at 266-67 (holding that reinstatement of an expired term of voluntary departure is not available
14 but that a stay of voluntary departure is); *Rife*, 374 F.3d at 616 (same).

15 Contrary to the government's arguments, then, we see nothing in any statutory or
16 regulatory provision relating to voluntary departure that rebuts the presumption that courts may
17 stay an agency order pending review of a petition on the merits.

18 C. Orders of Voluntary Departure as Final Orders of Removal

19 While the parties vigorously argue about the provisions we have just discussed, neither
20 party has raised what we observe to be an additional jurisdictional question: whether a BIA order
21 granting voluntary departure, and ordering removal only in the alternative should the applicant

1 overstay the grant of voluntary departure, is a final order of removal subject to judicial review
2 under 8 U.S.C. § 1252. We consider this question because of our independent obligation to
3 assure ourselves of our own jurisdiction. *See Arnold v. Lucks*, 392 F.3d 512, 517 (2d Cir. 2004);
4 *Henrietta D. v. Giuliani*, 246 F.3d 176, 179 (2d Cir. 2001). We conclude that an order of
5 voluntary departure that includes an alternate order of removal is a final order subject to judicial
6 review under 8 U.S.C. § 1252 once the BIA has affirmed it, as the Third Circuit has persuasively
7 explained. *See Obale*, 453 F.3d at 157-60.

8 The provision of the INA that describes final orders of removal defines such orders as
9 those that “conclud[e] that the alien is deportable or order[] deportation.” 8 U.S.C. §
10 1101(a)(47)(A).³ Such orders

11 shall become final upon the earlier of –

12 (i) a determination by the Board of Immigration Appeals affirming such order; or

13 (ii) the expiration of the period in which the alien is permitted to seek review of
14 such order by the Board of Immigration Appeals.

15 8 U.S.C. § 1101(a)(47)(B). Because the IJ’s order granting voluntary departure and ordering
16 removal in the alternative has the effect of concluding that the alien is removable and contains a
17 contingent order of removal, courts — including the Supreme Court — have long held that “[t]he

³ Although this provision of the INA refers on its face to orders of deportation and not orders of removal, the IIRIRA replaced the previous distinction between deportation and exclusion with the inclusive label of “removal.” *See Patel v. McElroy*, 143 F.3d 56, 61 (2d Cir. 1998). Moreover, the IIRIRA specifically provided that “[f]or purposes of carrying out the Immigration and Nationality Act, as amended by this subtitle – . . . any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation.” 104 P.L. 208, 110 Stat. 3009, § 309(d)(2) (1996). Accordingly, we construe the reference to orders of deportation in 8 U.S.C. § 1101 as applying to orders of removal.

1 granting of voluntary departure relief does not result in the alien's not being subject to an
2 outstanding final order of deportation." *Foti v. INS*, 375 U.S. 217, 220 n.1 (1963); *see also*
3 *Hadera v. INS*, 136 F.3d 1338, 1340-41 (D.C. Cir. 1998); *Karimian-Kaklaki v. INS*, 997 F.2d
4 108, 112 (5th Cir. 1993). This reading was consistent with INS regulations that were in place for
5 over 35 years, providing that "an order of deportation, including an alternate order of deportation
6 coupled with an order of voluntary departure, . . . shall become final upon dismissal of an appeal
7 by the Board of Immigration Appeals . . . ; or, . . . it shall be final as of the date of the Board's
8 decision." *See Obale*, 453 F.3d at 158-59 (citing former 8 C.F.R. § 243.1 (1997)).

9 New regulations put in place by the Department of Homeland Security in 2005 purported
10 to change the rules of finality. The relevant provision states that

11 If an immigration judge issues an alternate order of removal in connection with a
12 grant of voluntary departure, [an order of removal becomes final] upon overstay of
13 the voluntary departure period except where the respondent has filed a timely
14 appeal with the Board. In such a case, the order shall become final upon an order
15 of removal by the Board or the Attorney General, or upon overstay of any
16 voluntary departure period granted or reinstated by the Board or the Attorney
17 General.

18 8 C.F.R. § 1241.1(f) (2005). This new regulation would seem to indicate that unless and until an
19 alien overstays the period of voluntary departure, there is no final order from which to appeal.

20 However, we agree with the Third Circuit that this interpretation of the regulation is
21 "inconsistent with the statutory definition of a final order of removal if applied to determine
22 finality for purposes of judicial review," because, under 8 U.S.C. § 1101(a)(47)(B), "the statutory
23 definition of an order of removal encompasses not only orders actually ordering removal but also
24 orders in which an IJ merely determines that an alien *is* removable and issues a contingent order

1 of removal.” *Obale*, 453 F.3d at 160. We also agree that the new regulation seems to conflict
2 with Congress’s intent in the IIRIRA to allow aliens to pursue petitions for review from abroad:
3 If an alien complied with an order of voluntary departure and left the country within the allotted
4 time, no final order of removal would ever come into existence under the new regulation, and
5 thus the alien would be prohibited from appealing. *See id.* at 160 n.9. We cannot uphold a
6 regulation that is inconsistent with both the plain meaning and purpose of the statute. *See, e.g.*,
7 *Fowlkes v. Adamec*, 432 F.3d 90, 97 (2d Cir. 2005). Accordingly, like the Third Circuit, we
8 decline to enforce § 1241.1(f). *See Obale*, 453 F.3d at 160 and n.9 (positing additionally that §
9 1241.1 “may have been intended solely to specify when an order of removal may be executed, as
10 opposed to when an order of removal is final for purposes of [judicial] review”); *cf. Kanacevic v.*
11 *INS*, 448 F.3d 129, 134-35 (2d Cir. 2006) (declining “to elevate form over substance” in the
12 interpretation of what constitutes a final order of removal and therefore treating a denial of
13 asylum in an asylum-only proceeding as “the functional equivalent of a removal order”).

14 Because orders of voluntary departure are final orders of removal for the purposes of
15 judicial review, and because the provisions in the INA governing voluntary departure do not strip
16 us of our traditional authority to stay agency orders pending consideration of petitions for review
17 on the merits, we hold that stays of voluntary departure orders are available to those aliens who
18 can meet the standard for a stay.

19 D. Whether a Stay of Voluntary Departure Should Issue Here

20 The parties agree that if we hold that we have the authority to issue a stay of the order of
21 voluntary departure — as we now have — the usual criteria for obtaining injunctive relief apply.

1 Our task is therefore to balance “the likelihood of success on the merits, irreparable injury if a
2 stay is denied, substantial injury to the party opposing a stay if one is issued, and the public
3 interest.” *Mohammed*, 309 F.3d at 100 (applying these criteria to the issuance of stays of
4 removal); *see also El Himri*, 344 F.3d at 1262-63 (applying these criteria to the issuance of stays
5 of voluntary departure); *Nwakanma*, 352 F.3d at 328 (same). We have treated these criteria
6 somewhat like a sliding scale, citing approvingly other circuits’ formulation that “[t]he necessary
7 ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the
8 other stay factors” and explaining that “[t]he probability of success that must be demonstrated is
9 inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay.
10 Simply stated, more of one excuses less of the other.” *Mohammed*, 309 F.3d at 101 (citing *Wash.*
11 *Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (internal
12 citation marks and changes omitted) and *Mich. Coal. of Radioactive Material Users, Inc. v.*
13 *Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (internal change omitted)).

14 Applying this standard here, we conclude that the stay should issue because Thapa has
15 demonstrated some possibility of success and the balance of hardships tips decidedly in his
16 favor.⁴

17 According to the limited papers before us at this stage, Thapa makes two different
18 arguments in his petition for review: first, that he was served with an invalid NTA in that the

⁴ We note that our preliminary assessment of Thapa’s likelihood of success on the merits is not exhaustive; we are without the benefit of full briefing and oral argument on the matter. We further note that this assessment in no way limits the decision of the separate panel that will ultimately be charged with deciding the merits of Thapa’s petition for review.

1 NTA was not issued by any of the officers listed in 8 C.F.R. § 239.1(a) as being authorized to so
2 issue NTAs, and second, that the BIA abused its discretion by denying his motion for a
3 continuance based on a pending labor certification.

4 We doubt that Thapa has much likelihood of success on the first argument.
5 Notwithstanding his citation to *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991), in which we
6 remanded to the BIA a case in which the agency had declined to follow its own regulation, the
7 regulation at issue in that case involved the petitioner's right to be represented by counsel at
8 deportation proceedings, and the petitioner had definitely established prejudice. We do not
9 believe that the mere lack of a signature on the NTA, where the proper signature was on the NTA
10 submitted to the immigration court and where the substance of the NTAs was the same, rises
11 anywhere near this level.

12 However, we believe that Thapa has a somewhat stronger chance of success on the
13 second argument. Although we have recently issued two decisions finding no abuse of discretion
14 in IJs' refusals to grant continuances and placing a heavy burden on the petitioner to establish
15 abuse of discretion, we agree with Thapa that those decisions are distinguishable. In *Morgan v.*
16 *Gonzales*, 445 F.3d 549 (2d Cir. 2006), we held that there was no abuse of discretion in denying
17 a continuance so that a second petition to adjust status on the basis of a marriage could be
18 adjudicated where the marriage in question had already been determined not to be bona fide. In
19 contrast, Thapa's labor certification had never been denied, and he was proceeding in good faith.
20 In *Sanusi v. Gonzales*, 445 F.3d 193 (2d Cir. 2006) (per curiam), we found no abuse of discretion
21 in denying a continuance where the petitioner had already been granted two continuances and

1 was simply seeking to put more medical evidence in the record to support a CAT claim (and
2 where there had been an adverse credibility finding on the other claims). Here, in contrast,
3 Thapa's labor certification was entirely out of his hands at the time of the hearing; there was
4 nothing he could do to move the process along, and he had not been found incredible on any
5 point.

6 A case that may further work in Thapa's favor is the Seventh Circuit's decision in *Subhan*
7 *v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), in which the court found (although not under abuse of
8 discretion review) that the IJ erred by not granting the petitioner a third continuance where the
9 ground for the application was adjustment to status based on employment entitlement. The court
10 observed critically that the denial was based simply on the fact that the labor authorities had not
11 acted yet — a circumstance entirely out of the petitioner's control — instead of anything more
12 particularized to the alien (*e.g.*, he had behaved in a dilatory fashion, he was unqualified for
13 employment certification, etc.) or more policy-based (*e.g.*, an illegal alien should not be able to
14 delay his removal beyond a year). *See id.* at 593-94. The court also emphasized the difficulty in
15 speeding up the labor departments' procedures and the lack of power an alien has with respect to
16 the labor departments' actions. *See id.* at 593 ("He endeavored — with all due diligence, so far
17 as appears — to obtain them; but the wheels of bureaucracy grind slow, and at the end of six
18 months he had not succeeded in obtaining them and so he sought and was granted a further six-
19 month continuance. Again through no laxity or other fault on his part, the labor departments did

1 not act on his application within the further six-month period.”).⁵

2 While we cannot conclude on the record before us that, against this legal background,
3 Thapa will ultimately prevail on the merits, we can conclude that Thapa has raised a substantial
4 enough question to pass this first threshold.

5 As to the question of irreparable harm, “this Circuit has granted a stay pending appeal
6 where the likelihood of success is not high but the balance of hardships favors the applicant.”
7 *Mohammed*, 309 F.3d at 101. Even if Thapa’s likelihood of success is not overwhelming, we
8 agree with Thapa that he will face irreparable harm in the absence of a stay. On the one hand, if
9 he were to depart voluntarily by the BIA’s deadline, he would be inadmissible for ten years under
10 8 U.S.C. § 1182(a)(9)(B)(i)(II), which provides that “[a]ny alien (other than an alien lawfully
11 admitted for permanent residence) who . . . has been unlawfully present in the United States for
12 one year or more, and who again seeks admission within 10 years of the date of such alien’s
13 departure or removal from the United States, is inadmissible.” Because Thapa falls into this
14 category, even his approved employment certification would do him no good; no legal admission
15 would be available to him for the next decade. On the other hand, if Thapa did not depart

⁵ It is true that, unlike in *Subhan*, the BIA here did give a reasoned policy explanation for why open-ended labor certification processes, unlike family-based petitions, should not give rise to endless continuances. But whether this explanation can withstand scrutiny is a matter that deserves fuller consideration. We raise the question — although we leave to the merits panel resolution of the answer — of whether a system that specifically provides for cancellation of removal on the basis of employment certification can escape being arbitrary and capricious where it does not afford adequate time for a petitioner to obtain such labor certification, or where there is no reasoned standard for what length of time would be adequate. In this context, we note that Thapa obtained labor certification from the U.S. Department of Labor on November 21, 2005, approximately thirteen months after the IJ denied Thapa’s request for a continuance.

1 voluntarily by the deadline, he would also be prohibited from adjusting status based on the
2 approved employment certification for ten years because of the consequences of violating orders
3 of voluntary departure. *See* 8 U.S.C. § 1229c(d). The government argues that any harm Thapa
4 faces as a result of not leaving the country is of his own doing and so is not irreparable; but given
5 the catch-22 in which Thapa finds himself, we do not find that argument compelling.

6 In contrast, the government has not articulated any cognizable injury that it will suffer if
7 Thapa receives a stay pending appeal. Moreover, we cannot see how the public interest would
8 suffer from our grant of a stay. We agree with the government that there is a public interest in
9 enforcing bargains between aliens and the government, but we do not see how granting a stay
10 here undoes those bargains. There is no indication that Thapa will not carry out his agreement to
11 leave voluntarily within the specified time frame in the event that we ultimately deny his petition
12 for review. In the meantime, Thapa points out that he has no criminal history, he is not a danger
13 to the security of the United States, and he has a job offer from a United States employer who is
14 unable to fill the slot with a qualified American employee. In light of this background, we do not
15 believe that the public is harmed by his staying while we consider his petition on the merits.

16 Accordingly, we reaffirm our grant of a stay of the order of voluntary departure.

17 **III.**

18 We now turn briefly to Thapa's motion for a stay of removal. While there is general
19 agreement that the same overall standard applies to stays of voluntary departure orders as to stays
20 of removal orders, our sister circuits nonetheless differ in their approaches to motions to stay
21 these different types of orders. The Ninth Circuit, for example, treats motions to stay the two

1 types of orders as identical, *see Desta v. Ashcroft*, 365 F.3d 741, 749-50 (9th Cir. 2004), while
2 other circuits have observed that “there may be cases where the equities relevant to the two types
3 of stay will balance differently.” *Rife*, 364 F.3d at 616; *see also Bocova*, 412 F.3d at 270; *Alimi*,
4 391 F.3d at 892-93. We agree with this latter observation and, accordingly, do not conclude that
5 granting Thapa’s motion for a stay of the voluntary departure order will necessarily lead to a
6 grant of his motion for a stay of the order of removal. Because the motion for a stay of removal
7 in the instant case has not been fully briefed, we do not rule on it at this time.

8 IV.

9 For the foregoing reasons, we affirm our prior grant of Thapa’s motion for a stay of
10 voluntary departure. A separate panel will consider the petition for review on the merits in the
11 normal course.